

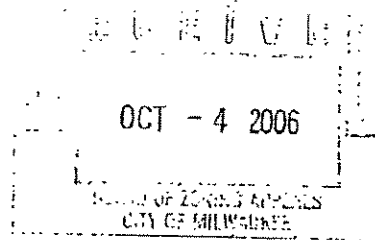
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September 28, 2006



Clifton W. Crump, Secretary  
Board of Zoning Appeals  
809 North Broadway

Re: Appeal of Short Term Financial, LLC Concerning an Order of Revocation of an  
Occupancy Certificate Issued on May 1, 2006 for the Premises Located at 9228  
West Capitol Drive

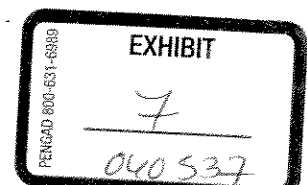
Dear Mr. Crump:

On September 14, 2006, the Board of Zoning Appeals ("Board") adjourned the above-referenced item on its agenda for the hearing conducted on that day and denoted as Item No. 56 in order to seek advice from this office on two matters pertinent to determination of this item. This office received your request for an opinion on the following two questions on September 22, 2006:

1. The appellant, via counsel, has put forth an appeal before the Board seeking a Special Use permit, an Interpretation determination or an Appeal of Order ruling. Please advise the Board, based off the permit history and enforcement efforts, as to what matter(s) are properly before the Board.
2. An occupancy permit was issued to the appellant on May 1, 2006, by the City of Milwaukee Development Center, for the purpose of occupying the premises as a Consumer Finance establishment. Under the provision outlined in code § 295-113, the Development Center then revoked that occupancy permit based on certain aspects of the presiding plan of operation. Specifically as stated in a letter by Chris Rute the Development Center manager, "According to information received, your operation is most closely aligned with Currency Exchange, Pay Day loan, and Title Loan agency as defined by the City of Milwaukee Code of Ordinances." That said and with the knowledge that the Board retains ultimate authority and jurisdiction regarding these matters, the Board seeks guidance on the issue of the automatic electronic fund

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transfer that occurs as part of the loan repayment process. Does that process effectively equate to the function and definition of a Pay Day Loan agency?

Accompanying your request was a copy of the record before the Board with respect to this appeal as of the close of the hearing on September 14, 2006. We have reviewed that record, and are pleased to respond to your request on the basis of that review. Aside from pertinent statutes, ordinances, and cases, we have not reviewed any other materials in the course of preparation of this opinion.

### BACKGROUND

This appeal concerns the occupancy status of Short Term Financial, LLC ("STF") with respect to the premises located at 9228 West Capitol Drive in the City of Milwaukee (the "Property"). The Property is located in an LB2 local business zoning district. At base, this appeal concerns the determination of the proper use classification to be applied to STF lending facility located at the Property. Three potential use classifications may be applicable as follows: (a) "Bank or financial institution," which is a permitted use in an LB1 zoning district; (b) "currency exchange, payday loan, or title loan agency," which is a special use in an LB2 zoning district; and (c) "retail establishment, general," which is a limited use in an LB2 zoning district.<sup>1</sup> Section 295-603-1, Milwaukee Code of Ordinances ("MCO"), "Commercial districts use table".

STF has been licensed by the State of Wisconsin Department of Financial Institutions ("WDFI") as a "loan company" regulated under the provisions of Wis. Stat. § 138.09. STF operates a conventional lending facility, providing consumer installment loans for terms of at least six months. STF's application materials do not indicate the nature or extent of loan offerings for periods of more than six months, although they indicate that loan packages covering a term of 12 months are in the process of development. STF asserts that its sole lending activity consists of conventional "pre-computed" installment loans, in which the debt represented by the loan "is expressed as a sum comprising the principle and the amount of interest computed in advance." (STF Amended Statement of Use and Plan of Operation dated August 9, 2006 at p. 9). Such loans are regulated by WDFI under the auspices of Wis. Stat. § 138.09. STF specifically asserts that it "offers one form of retail lending and that is as a pre-computed loan company under the

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<sup>1</sup> The "limited use standard" applicable to a "general retail establishment" in a commercial zoning district is that: "The use shall not be operated between 12:00 a.m and 5:00 a.m. if it is located within 100 feet of a residential district," except for convenience stores regulated by § 84-7, MCO. § 295-603-2-f, MCO. This standard is irrelevant to determination of this appeal, even if STF's loan facility were somehow to be deemed within this use classification, given that its Plan of Operation does not contemplate any operations between the hours of 12:00 a.m. and 5:00 a.m.

jurisdiction of the Wisconsin Administrator of Banking (8, p. 10), and it does not offer any other type of credit. There is no contrary evidence in the record.

The following allegations made by STF concerning the nature of its business appear to be salient:

- STF alleges that it does not cash checks or other negotiable instruments, and in fact asserts that it has specifically chosen not to engage in this type of business.
- STF asserts that it does not take personal checks as collateral for its loans. The materials of record indicates that STF engages in primarily (if not exclusively) unsecured consumer lending, and does not take specific collateral of any type.
- While STF does offer the option of arranging an automatic funds transfer from a borrower's checking account as a method of loan repayment, it asserts that this is in fact an option that may be elected by the borrower for purposes of convenience, and is not required. Furthermore, it alleges that such an electronic funds transfer arrangement is not intended as specific collateral for a loan, but rather as one potential method of repayment, much as on-line bill payment is offered by utilities and many merchants as a convenience option for their customers.
- STF asserts that it does not take its borrowers' motor vehicle titles as security for its loans. At most, it states that it might perfect a lien upon a borrower's motor vehicle title under the Wisconsin Uniform Commercial Code ("UCC"), in the manner generally utilized by creditors who finance the purchase of motor vehicles, a process that does not involve the taking of the title to the motor vehicle as security.

The record that we have reviewed contains no evidence to the contrary on any of these allegations.

STF's license to operate as a loan company was issued by WDFI on March 6, 2006. On April 13, 2006, STF applied to the Development Center of the Department of City Development ("DCD") for an occupancy certificate that would permit it to occupy the Property, listing the proposed use as "consumer finance-consumer installment loans". The requisite inspection was conducted on April 24, 2006, and an occupancy certificate was issued on May 1, 2006 (Occupancy Certificate No. 709164).

On July 6, 2006, DCD revoked STF's occupancy certificate for the Property. According to a letter transmitted to you by Ms. Angela Ferrill, zoning inspector for the Department of Neighborhood Services ("DNS") dated September 11, 2006, this determination was

premised upon a "complaint received" regarding the occupancy, but the record we have reviewed indicates nothing as to the identity of the complainant or the substance of the complaint. Ms. Ferrill's letter indicates that the occupancy certificate was rescinded by "City of Milwaukee Development Center."

The record also contains a letter dated July 6, 2006 from Mr. Chris Rute the Permit and Development Center manager for DCD's Development Center to Mr. Jason M. Case of STF indicating that the original occupancy certificate No. 709164 was allegedly "issued in error." This letter further states that: "According to information received, your operation is most closely aligned with Currency Exchange, pay day loan and title loan agency as defined by City of Milwaukee Code of Ordinances. The application did not completely or accurately describe the proposed use. These uses require Board of Zoning Appeals approval as the Special Use prior to a Certificate of Occupancy being issued." Neither this letter nor any other information in the record indicates what "information" had been received by Mr. Rute or DCD as to the proper classification of STF's facility; nor does the record indicate how STF's application for its occupancy certificate did not "completely or accurately describe the proposed use." Mr. Rute's letter rescinded the Certificate of Occupancy, and directed that STF's loan facility be vacated until a new Certificate of Occupancy was issued in accordance with the terms of his letter. Mr. Rute reaffirmed his determination by way of an e-mail communication dated July 21, 2006 and transmitted to Ms. Bonnie J. Schoenberg, STF's General Counsel. The record indicates that STF's facility continued to operate nonetheless, and that at no time has it been vacated or otherwise closed.

On July 21, 2006, DNS delivered a placard order to STF's branch manager at the Property entitled "Inspection Report and Order to Correct Condition," ordering vacation of the premises "within 1 day of service of this order. . ." On the same day STF appealed that order to the Board, and further claimed: (a) that STF's loan facility constituted a permitted use with its LB2 zoning district; and (b) even if it did not, STF was entitled to issuance of a special use permit, the requisite specified by DCD as a condition of its continued occupancy of the Property. In so doing, STF sought to appeal all of these issues to the Board, stating that it was "seeking from BOZA a determination of use that it does not need a special use permit or, in the alternative, the approval of its Application for special use permit." (STF Supplement to Notice of Appeal and Application for Review dated July 21, 2006 at p. 4).

The record contains several subsequent documents of interest including: (a) two requests for disclosure of public documents under the Wisconsin Open Records Law issued by STF's counsel to DNS officials dated August 4, 2006 and August 6, 2006; (b) an Amended Statement of Use and Plan of Operation for Determination of Use or Issue [sic] Special Use Permit" filed by STF with the Board on August 9, 2006; (c) a "Request for

Temporary Occupancy (Zoning)” filed by STF with the Development Center, also on August 9, 2006; (d) several evidentiary affidavits filed by STF with the Board on September 12 and 13, 2006 in preparation for the September 14, 2006 Board hearing; (e) a document entitled “DNS Position Statement” dated September 20, 2006 and transmitted by Mr. Ronald Roberts, Supervisor at DNS’s Zoning Enforcement Division to Board Chairman Craig Zetley; and (f) a draft of an ordinance entitled “Legislative File No. 060537 (Version 0)” listing Alderman James Bohl as sponsor, and entitled “An ordinance relating to zoning regulations for pay day loan agencies,” which has not as of yet apparently been adopted. We have reviewed these materials in the course of preparation of this opinion.

**DETERMINATION OF THE MATTERS PROPERLY  
BEFORE THE BOARD OF ZONING APPEALS**

STF has sought Board review and determination of the following two items:

1. Whether its proposed lending facility located at the Property is properly classified as a permitted use (“bank or other financial institution”), which would not require Board action or approval for continued occupancy, or, alternatively, whether it is properly classified as a special use (“currency exchange, payday loan or title loan agency”), which would require issuance of a special use permit by the Board per § 295-311-2, MCO as a condition of continued occupancy;<sup>2</sup>
2. If its lending facility is properly classified as a special use, whether STF has met the criteria for issuance of a special use permit as specified by §§ 295-311-2-d and d-1 through d-4, MCO, on the basis of testimonial and documentary evidence that it has submitted to the Board or that it may submit if the Board conducts further hearings on this matter.

We believe that the Board possesses the requisite jurisdiction and authority to address both issues. Section 295-311-1-a-1, MCO vests the Board with the power to, among other matters, to “interpret this chapter” (Zoning Code, Ch. 295, MCO), “to approve, conditionally approve or deny variances and special use permits,” and to “hear and decide appeals of administrative decisions of the Commissioner of City Development or

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<sup>2</sup>As earlier noted, it is conceivable, although not likely, that this facility might be classified as a limited use (“retail establishment, general”), which would also not implicate the necessity of Board action or approval as a condition of STF’s continued occupancy of the Property.

the Commissioner of Neighborhood Services that may arise this chapter or state statutes." This authority is quite broad. It certainly encompasses the type of declaratory relief that STF seeks, *i.e.*, whether under the provisions of the Zoning Code, its facility is required to obtain a special-use permit. Additionally, it encompasses STF's appeal of both DCD and DNS's efforts to revoke its occupancy certificate and to require it to vacate the Property. In this respect, please note that DNS' revocation Order of July 21, 2006 cites § 295-303, MCO, a provision of the Zoning Code, as its source of authority. Even if § 200-31, MCO, a provision of the Code of Ordinances outside the Zoning Code is also regarded as a source of DNS revocation authority, the Board has specific jurisdiction to hear and determine appeals from revocation orders issued under authority of that provision as well. § 295-311-1-a-2, MCO.

Thus, it is our opinion that STF has properly placed both subcomponents of its appeal before the Board for determination, and that the Board possesses jurisdiction and authority to make determinations as to both issues. Of course, should the Board determine issue #1 in favor of STF (*i.e.*, that its lending facility constituted either a permitted use or a limited use), there would be no need for it to address issue #2 (*i.e.*, whether its application met the applicable special-use criteria set forth by §§ 295-311-2-d and d-1 through d-4, MCO).

DNS's "Position Statement" dated September 20, 2006 raises the additional item of whether STF's appeal must be determined in accordance with the standards set forth in § 295-311-6-h, MCO. This is premised upon a theory that STF's appeal to the Board is taken from DNS's Order of July 21, 2006 revoking STF's occupancy certificate. This view is somewhat doubtful, given that the original revocation directive and order to discontinue operations was issued by Mr. Chris Rute, manager of the Development Center, a component of DCD, on July 6, 2006. Even assuming this not to be the case, DNS's observation may have little practical effect under these circumstances, given that its July 21, 2006 revocation Order was premised upon the assumption that STF required the issuance of a special use permit in order to continue operating at the Property. Of course, if STF's lending facility is properly characterized as a permitted use, or as a limited use (*i.e.*, as something other than a "currency exchange, payday loan, or title loan agency"), DNS's revocation Order must be vacated, even under the standards specified by § 295-311-6-h, MCO. In effect, the entire issue is subsumed into the larger issue of the proper use classification of STF's facility.

DNS also asserts that STF failed to follow the requisites the § 295-311-5, MCO entitled "Appeals of Administrative Decisions." This provision pertains to appeals from determinations of DCD to the Board, and in this instance would apply to Mr. Rute's revocation of STF's occupancy certificate as expressed by his letter of July 6, 2006 and subsequent e-mail communication of July 21, 2006 affirming his earlier letter. We

believe DNS's contention in this respect to lack merit. Our review of STF's appeal and materials submitted in conjunction with that appeal indicate full compliance on its part with its procedural obligations specified under § 295-311-5, MCO. The only missing element is a report from a DCD officer to the Board as specified by § 295-311-5-d, MCO, which also provides that the Board may proceed with hearing and decision on the appeal regardless of whether such a report is submitted provided that 30 days have elapsed from the date upon which DCD was notified of the appeal. This condition has been satisfied.

**DOES STF'S ELECTTRONIC FUND  
TRANSFER OPTION EFFECTIVELY TRANSFORM  
ITS LENDING FACILITY INTO A PAY DAY LOAN AGENCY?**

Your second inquiry concerns whether the electronic fund transfer option offered by STF to its borrowers as one method of loan repayment "effectively equate to the function and definition of a Pay Day Loan Agency?" Based upon our review of the available record, we conclude that the answer is "no."

A "payday loan agency" is a specifically defined term within the Zoning Code as an "establishment providing loans to individuals in exchange for personal checks as collateral." §§ 295-201-445 and 295-203-5-f, MCO. STF's application and other materials accompanying its appeal repeatedly assert that it does not engage in this type of activity, and specifically that it does not take personal checks (post-dated or otherwise) as collateral for any of its loans. The record contains no contrary evidence.

We now address the associated question of whether the electronic funds transfer option converts STF's facility into a *de facto* "payday loan agency." Once again, our answer is "no." At the outset, the specific definition of the term "payday loan agency," which appears twice in the Zoning Code, does not encompass or address electronic fund transfer fund payment mechanisms. It includes only establishments "providing loans to individuals in exchange for personal checks as collateral" and nothing more. In this respect, the ordinance definition is clear and unambiguous. It is well established that if the plain meaning of a statute or an ordinance is clear, there is no need to resort to rules of statutory or other construction or other extrinsic aids; the clear meaning of the statute or ordinance must be applied to the facts at hand. *Bruno v. Milwaukee County*, 2003 WI 28 ¶ 7, 260 Wis. 2d 633, 638, 660 N.W.2d 656, 659; *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324, 333, 596 N.W.2d 472, 478 (Ct. App. 1999). Thus, according to the prevailing rules of construction, there is no occasion for any attempt to expand the definition of a "payday loan agency" beyond the explicit language utilized in two separate sections of the Zoning Code.

Furthermore, the electronic funds transfer option offered by STF does not amount to the functional equivalent of taking a personal check as collateral for a loan. To begin with, it does not even constitute collateral; STF's loans apparently remain unsecured irrespective of the method of repayment elected by the borrower. Additionally, it is an option, not a requirement. A borrower is free to decline this option and to repay installment or other loans offered by STF on a prescribed contractual installment schedule as is the case with other types of conventional loans. It appears that any bank account information submitted by STF customers who choose to avail themselves of the electronic funds transfer option (e.g., checking account or routing numbers) are obtained solely for the purpose of setup of the payment mechanism, and do not assume a function equivalent to that of "collateral."

We wish to make one final observation. Your second inquiry indicated that Mr. Rute's letter revoking STF's occupancy permit (dated July 6, 2006 and reaffirmed on July 21, 2006) asserted that STF's operation "is most closely aligned with Currency Exchange, payday loan and title loan agency as defined by City of Milwaukee Code of Ordinances." (Emphasis added). You have correctly noted that the pertinent ordinance reference for such a conclusion might be § 295-113, MCO entitled "Uses Not Specifically Enumerated." In our opinion, it is at best doubtful that this ordinance provision applies to this situation. Section 295-113, MCO applies only "if a proposed land use is not specifically enumerated as a permitted use, limited use, special use, or prohibited use" within a zoning district. In this respect, we call your attention to the Zoning Code definition of the term "bank or other financial institution" which constitutes a permitted use within a LB2 zoning district. That definition encompasses "an establishment providing retail banking, credit and mortgage services. This term does not include a currency exchange, a payday loan agency or a title loan agency." If STF can establish that its facility located at the Property provides "credit services," it would fall within the definition of "bank or other financial institution" (and would thus constitute a permitted use within its zoning district) unless it also falls within at least one of the following three Zoning Code definitions: "currency exchange," "payday loan agency," or "title loan agency." Our reading of the record provided to us indicates that STF's facility in all likelihood falls within one (or perhaps more) of these use classifications and thus constitutes a "specifically enumerated use." Consequently, there would be no occasion to resort to § 295-113, MCO.



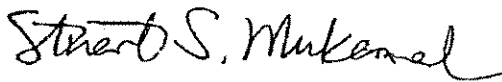
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If you have any further questions concerning these matters, please do not hesitate to contact this office.

Very truly yours,



GRANT LANGLEY  
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